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No. 09-21

Supreme Court, U.S.
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In The Supreme Court of the United States

PAUL WARNER POWELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Is there a compelling reason to review the federal habeas court's judgment upholding the state court's decision – which this Court already rejected as grounds for review on direct appeal – that denied a double jeopardy claim because the intent of the state legislature is that separate capital murder offenses are committed whenever there are separate victims of the gradation offenses?

2. Should this Court consider granting a stay of execution, or certiorari review, on Powell's assertion that his double jeopardy and ineffective assistance of counsel claims both involve the issue in the grant of certiorari in *Wood v. Allen* (involving a federal court's analysis of state-court fact-finding), despite the fact that Powell's case only involved state law determinations and no facts were at issue?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. The First Trial and Appeal 2

II. The Second Trial and Appeal 10

III. The State Habeas Corpus Case 15

IV. The Federal Habeas Corpus Case 16

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY SHOULD BE DENIED 17

I. Powell never has presented his first argument to any court and, in any event, it fails to merit further review 17

II. Powell's bill of particulars argument addresses no federal issue 20

III. The certiorari questions at issue in *Wood v. Allen* are not at issue here 25

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Barefoot v. Estelle, 463 U.S. 880 (1983) 32

Blockburger v. United States, 284 U.S. 299 (1932) 22, 23

Brown v. Ohio, 432 U.S. 161 (1977) 24

Bullington v. Missouri, 451 U.S. 430 (1981) 17, 19, 20

Clark v. Arizona, 548 U.S. 735 (2006) 18

Harward v. Commonwealth, 330 S.E.2d 89 (Va. 1985) 9

Illinois v. Gates, 462 U.S. 213 (1983) 18

Kentucky v. Stincer, 482 U.S. 730 (1987) 18

Livingston v. Commonwealth, 36 S.E.2d 561 (Va. 1946) 13, 21

Payne v. Commonwealth, 509 S.E.2d 293 (Va. 1999) 9, 21

Powell v. Commonwealth, 552 S.E.2d 344 (Va. 2001) 6, 8, 9, 14, 18

Powell v. Commonwealth, 590 S.E.2d 537 (Va. 2004) 14, 15, 21, 24

Powell v. Kelly, 531 F. Supp.2d 695 (E.D. Va. 2008) 16, 24

Powell v. Kelly, 551 U.S. 1118 (2007) 16

Powell v. Kelly, 562 F.3d 656 (4th Cir. 2009) 16, 24, 27, 28, 29

Powell v. Virginia, 543 U.S. 892 (2004) 15

TABLE OF AUTHORITIES – Continued

Page

Powell v. Warden, 634 S.E.2d 289 (Va. 2006).....16, 29, 30, 31

Ring v. Arizona, 536 U.S. 584 (2002).....19

Sanabria v. United States, 437 U.S. 54 (1978)....23, 24

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 17

Schriro v. Landrigan, 550 U.S. 465 (2007).....27

Strickland v. Washington, 466 U.S. 688 (1984).....16, 29

United States v. Dixon, 509 U.S. 688 (1993).....23

Wiggins v. Smith, 539 U.S. 510 (2003).....26

Wood v. Allen, 129 S.Ct. 2389 (2009) 25, 31

Williams v. Taylor, 529 U.S. 362 (2000).....27

STATUTES AND RULES

Federal Statutes:

28 U.S.C.:

§ 2254.....16, 27

§ 2254(d) 16, 27, 31

§ 2254(d)(2).....25, 26, 28

§ 2254(e) 27, 31

§ 2254(e)(1).....26, 28, 31

Code of Virginia

§ 18.2-26 6

§ 18.2-31(1-15).....6, 18

TABLE OF AUTHORITIES – Continued

Page

§ 18.2-31(4) 6

§ 18.2-31(5) 7

§ 18.2-61 6

§ 19.2-264.4 13

§ 53.1-232.1 ..... 16, 17

U.S. Sup. Ct. R. 10 18

INTRODUCTION

No court ever has granted relief to Paul Powell on his currently-claimed allegations of double jeopardy and ineffective assistance of counsel. Powell now fully admits his guilt and says his crimes of murder, attempted rape, rape, and attempted murder were "atrocious." However, he omits those "atrocious" facts, including his own expert's evaluation of him which described a severe psychopathy. Those "atrocious" facts were crucially integral to the lower courts' finding, on his claim of ineffective assistance, that Powell was not prejudiced by his trial counsel's failure during the sentencing phase to object to one inaccurate entry on a criminal records form.

Powell's certiorari petition misrepresents the legal holdings of the state supreme court and federal habeas courts, all of which rejected his claims. On his double jeopardy claim, he ignores the settled state law which defined the very acts he personally boasted he had committed as separate offenses perpetrated against two different victims. On his ineffective assistance claim, he repeatedly mistakenly implies that the Commonwealth purposefully presented his sentencing jury with false evidence when there never has been one shred of evidence to support such an implication. He misstates that the criminal record form contained numerous errors when, in fact, there only ever has been one error identified by Powell. And he ignores the holdings of all the lower courts which found that the one error was non-prejudicial because the role the form played in the sentencing proceeding

was virtually non-existent, the error could not have affected the jury's separate finding of vileness to support the death sentence, and the error would not have changed one juror's vote when the whole record, which proved Powell's future dangerousness by overwhelming evidence, is considered.

Finally, Powell attempts to stop his execution by misrepresenting that his case, and the judgment of the Fourth Circuit, are similar to another case upon which this Court has granted certiorari. This Court should not be misled by Powell's exaggeration and mischaracterization of the facts and law involved in his case.

STATEMENT OF THE CASE

I. The First Trial and Appeal

As found by the Virginia Supreme Court, the facts of Powell's brutal crimes are as follows:

> Powell was acquainted with Stacie Lynn Reed (Stacie) for two and a half years prior to the commission of the crimes in question. Kristie Erin Reed (Kristie), Stacie's younger sister, described her sister and Powell as "[f]riends." Powell, who was 20 years old at the time of the murder, had wanted to date Stacie, who was 16 years old, but recognized that she was underage and he "could go to jail for that."

Powell, a self-avowed "racist and white supremacist," was aware that Stacie, who was white, was dating Sean Wilkerson, who is black. Wilkerson had recently moved to another locality, but he and Stacie remained in contact. Stacie was a member of her high school's Junior Reserve Officer's Training Corps and planned to attend a military ball with Wilkerson.

Just before noon on January 29, 1999, Stacie arrived home from school early, having completed her examinations that were being given that day. Powell was waiting for her at her home when she arrived. When Powell learned that Robert Culver, a friend of the girls' mother, would be home shortly for lunch, Powell left and returned at about 12:45 p.m., after Culver had left. When Powell returned, he was armed with a "survival" knife, a "butterfly" knife, a box cutter, and a 9-millimeter pistol.

Stacie was talking to Wilkerson on the telephone. After Stacie ended the telephone conversation, Powell confronted her about her relationship with Wilkerson. He demanded that Stacie end her relationship with Wilkerson. According to Powell, he and Stacie argued, and the argument grew into a struggle. Powell drew the survival knife from his belt and Stacie "got stuck." Powell denied stabbing Stacie deliberately. The struggle continued briefly until Stacie collapsed on the floor in her sister's bedroom.

Although Powell did not know whether Stacie was still alive, he made no effort to determine her condition or call for medical assistance. Powell "wandered around the house, got some iced tea, had a cigarette." Kristie arrived home from school shortly after 3 p.m. and was met at the door of the home by Powell. Powell told her that Stacie was in her room, but moments later Kristie discovered her sister's body in Kristie's bedroom. She dropped her schoolbooks and began to cry.

Powell ordered Kristie to go to the basement. Kristie, who knew that Powell was usually armed, complied because she "didn't want to die." In the basement, Powell ordered Kristie to remove her clothes and to lie on the floor. Powell then raped Kristie, and she "begg[ed] him not to kill her." Powell later admitted that he knew that Kristie, who was 14 years old at the time of the rape, had been a virgin.

While Powell and Kristie were in the basement, Mark Lewis, a friend of Kristie, came to the house and knocked on the door. When Powell heard the knock, he tied Kristie's legs together and tied her hands behind her back with shoelaces he cut from her athletic shoes. Powell then dressed and went upstairs.

While Powell was upstairs, Kristie managed to loosen the bonds on her hands and attempted to "scoot across the floor to hide" under the basement steps. Hearing Powell

coming back to the basement, she returned to the position on the floor where he had left her. Powell then strangled Kristie with a shoelace and she lost consciousness. While she was unconscious, Powell stabbed Kristie in the abdomen and slit her wrists and throat.

Powell returned upstairs, searching for "anything worth taking." He fixed another glass of iced tea, which he took with him when he left the home a short time later. Powell went to a friend's house and then drove with the friend to the District of Columbia to buy crack cocaine.

Kristie regained consciousness sometime after Powell had left her home. About 4:10 p.m., she heard Culver return home, and she called out his name. Culver discovered Kristie in the basement, called the 911 emergency response telephone number, and began rendering first aid to her. . . .

An autopsy revealed that Stacie had died from a knife wound to the heart. The medical examiner testified that there was a single entrance wound and two exit wounds indicating that the knife had been withdrawn, at least partially, and then reinserted into the heart. . . .

Stacie's body also exhibited a number of bruises on the head, chest, abdomen, back, arms, and legs, abrasions on the face, a stab wound to the back, and a cut and scrapes on the left forearm. The autopsy further

> revealed that Stacie had been struck on the head with sufficient force to cause bleeding inside her scalp and in the membranes surrounding her brain prior to death. . . .
>
> While in jail, Powell wrote letters to friends in which he admitted having committed the murder, rape, and attempted murder because of Stacie's relationship with a black man. He further claimed that he had planned to kill Stacie's family and steal the family's truck. Powell also wrote to a female friend and asked her to "get one of [her] guy friends . . . to go to a pay phone and call Kristie and tell her [that] she better tell the cops she lied to them and tell her [that] she better not testify against me or she's gonna die."

Powell v. Commonwealth, 552 S.E.2d 344, 347-48 (Va. 2001). A grand jury in Prince William County, Virginia indicted Powell in 1999 for his capital murder of Stacie in the commission of robbery or attempted robbery (Va. Code § 18.2-31(4))[1], and for his rape (Va. Code § 18.2-61) and attempted murder (Va. Code § 18.2-26) of Kristie.

The trial court granted the Commonwealth's request to amend the indictment to add the charge of capital murder during the commission of rape or

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[1] In Virginia, capital murder is defined as a premeditated murder coupled with a specifically defined additional circumstance, or gradation offense, such as robbery or rape. Va. Code § 18.2-31(1-15).

attempted rape. Va. Code § 18.2-31(5).[2] The court denied Powell's objection to the amendment, but granted him a bill of particulars from the Commonwealth to name the victim of the rape/attempted rape. The prosecutor represented in the bill of particulars that that victim was Kristie. (JA 22).[3]

At the close of the evidence, the court instructed the jury that it could find capital murder if the Commonwealth proved beyond a reasonable doubt a premeditated murder in the commission of robbery or attempted robbery, and/or an additional capital murder if the Commonwealth proved beyond a reasonable doubt a premeditated murder during the commission of rape. (JA 59). There was no "attempted rape" or "attempted rape of Stacie" option on the capital murder instructions. The court also instructed the jury that it was "immaterial that the victim of the murder and the victim of the rape are two different people." (JA 63). On the instruction for the crime of rape, the court instructed that the victim was Kristie. (JA 64).

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[2] The amendment also included other language from § 18.2-31(5) charging the "commission of sodomy or attempted sodomy," but no evidence of sodomy was presented and the jury was not so instructed. There is no issue now regarding that language.

[3] References to the joint appendix filed below in the Fourth Circuit are denoted herein as "(JA __)." A copy of the joint appendix has been lodged with this Court.

During their guilt-phase deliberation, the jury asked the court whether the rape of Kristie satisfied the capital murder/rape charge. (JA 62). The court told the jury it did. (JA 62).

The capital murder sentencing verdict form specified that the jury found Powell guilty of capital murder in the commission of rape. (JA 78). The jury did not return a verdict of guilty on the capital murder/robbery charge. The court polled the jury on its verdict. Each juror verbally stated that rape, not attempted rape, was the predicate offense for the capital murder conviction. (JA 70-72). The jury also convicted Powell of the rape and attempted murder of Kristie. In a separate sentencing proceeding, the jury sentenced Powell to death for capital murder and to life terms for the other crimes.

In his 2001 direct appeal, Powell challenged the amendment of the indictment, specifically arguing that the amendment had charged Kristie as the alleged victim of the rape: "In the case now before this Court for review, the victim of the homicide and the alleged robbery was one person, Stacie Reed, while the victim of the alleged rape and sodomy was another person, Kristie Reed." (JA 923).

The Supreme Court of Virginia reversed the capital conviction. *Powell v. Commonwealth*, 552 S.E.2d 344 (Va. 2001). Two errors occurred. First, the trial court should not have allowed the amendment because the General Assembly intended that each enumerated capital crime be a separate offense, *see*

Payne v. Commonwealth, 509 S.E.2d 293, 301 (Va. 1999), and the Commonwealth could not add a new offense which had not been found first by the grand jury. Only minor defects or variances in indictments are permitted to be corrected by amendment. *Powell*, 552 S.E.2d at 356-57.

Second, the Commonwealth mis-worded its amended indictment to include the language "during" the commission of rape, instead of "in" the commission of rape. The former is restricted to crimes of murder occurring during or after the rape; the latter permits crimes of murder occurring before, during, or after a rape. *See Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985).[4] Because it was uncontested that Powell murdered Stacie before he raped Kristie, the murder could not have occurred "during" the commission of rape. The court remanded for re-trial on first-degree murder due to the amendment error, and because there was no evidence even to support the amended indictment. *Powell*, 552 S.E.2d at 356-57, 363.

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[4] After *Harward*, the General Assembly amended the statute to permit the more expansive crime of murder "in" the commission of rape, however, the Commonwealth in *Powell* mistakenly used the older, more restrictive, language discussed in *Harward*.

II. The Second Trial and Appeal

After remand, Powell wrote the prosecutor an obscene letter boasting that, because he could not be re-tried for capital murder, he would tell "the rest of what happened." (JA 141). He described in detail how, when Stacie refused to have sex with him, he attempted to rape her, and how, when she fought him, he stabbed her in her abdomen, and then stomped repeatedly on her throat until she was dead. (JA 141-44). The prosecutor nolle prossed the remanded first degree murder charge, and obtained a new indictment for capital murder on December 3, 2001, of Powell's capital murder of Stacie during the commission of his attempted rape of Stacie. (JA 108).

Before trial, Powell filed motions seeking to dismiss the capital murder indictment on double jeopardy grounds. The trial court found that the new indictment charged a different offense than had been tried in the first trial: neither the original 1999 indictment, nor the amended indictment, charged the capital murder of Stacie based on the rape or attempted rape of Stacie and the bill of particulars specified that Kristie was the only victim of the predicate offense of rape in the first trial. (JA 123, 139-40). The jury convicted Powell as charged.

In the separate sentencing phase, the prosecutor relied on the shocking evidence of the crimes themselves, and also presented evidence of Powell's self-professed racial hatred and desire to continue to kill through letters, drawings, and other admissions.

(JA 174-75). He killed Stacie because she was a "nigger-lovin slut," and he wanted to kill all black people. (Tr. 1/15/03 at 52-63). The jury received an offensive letter Powell had written to Stacie's mother after the murder that mocked her dead daughter with a photograph of a partially nude woman. (JA 168-69). They learned that Powell had tried to threaten Kristie's life if she testified against him. (Tr. 1/15/03 at 1217). They learned that Powell had tortured animals by blowing them up with firecrackers. (JA 189). They heard the heart-wrenching "911" call made when Robert Culver discovered the girls. (Tr. 1/14/03 at 39). They listened to the testimonies of Mr. Culver, Mrs. Reed and Kristie, learned how Kristie miraculously survived, but suffered horrific physical and mental trauma for many months, and viewed the terrible scars Kristie bears for the rest of her life across her throat. (Tr. 1/14/03 at 641-712).

They learned that Powell admitted he also would have shot and killed Mr. Culver if he had found Powell still there (Tr. 1/14/03 at 171), and Powell's view that the judge and jury "don't mean shit to me." (*Id.* at 172-73). They heard how the murder and rape tore the Reed family apart, resulting in their abandoning the house where it happened (their "dream home"), in Mrs. Reed being unable to leave Kristie alone, and ultimately leading Mrs. Reed and Mr. Culver, who had married shortly after the crimes, into divorce. (Tr. 1/15/03 at 76).

The jury also heard from Powell's own witnesses that he had been in and out of juvenile detention and

psychiatric hospitals since about the age of 11. (JA 277). Powell's psychologist told the jury that Powell was aggressive, defiant, impulsive, egocentric, opportunistic, exploitative, exhibited violent outbursts and had extreme "reactive anger." (JA 271-87).

The prosecutor submitted to the jury, without objection, the national criminal information form provided by the FBI which contained Powell's prior criminal record (the NCIC form). (JA 183, 606). The prosecutor stated orally, and accurately, to the jury that Powell had been convicted of the abduction, rape and attempted murder of Kristie as well as prior convictions for larceny and contributing to the delinquency of a minor. (JA 183). The NCIC form was not mentioned at trial other than to admit it into evidence.

The form accurately contained one entry for capital murder which was the conviction that had been reversed on appeal. (JA 606). The jury knew about that conviction and reversal, both from Powell's own letter to the prosecutor (JA 141-44), and from his trial counsel who informed the jury about the prior conviction and reversal. (JA 166-67). The form contained a second accurate entry for capital murder which was listed as a pending charge and which was the case before the jury for decision. (JA 607). The form also contained a third entry for capital murder which was inaccurate. That entry mistakenly listed

"capital murder" for Powell's "attempted capital murder" of Kristie. (JA 606).[5]

The jury found that Powell would commit violent acts that would constitute a continuing serious threat to society, and that his crimes were vile in that they constituted depravity of mind and aggravated battery. *See* Va. Code § 19.2-264.4.

On direct appeal, Powell argued that (1) the Virginia Supreme Court's opinion in the first appeal mandated that he not be tried for capital murder, (2) the "law of the case" precluded another trial for capital murder, and (3) double jeopardy barred the second prosecution. The Virginia Supreme Court unanimously rejected these arguments after thoroughly discussing them. It specifically held as a matter of state law:

> As noted above, while "it is true the bill of particulars is not for the purpose of charging the offense . . . the bill of particulars and the indictment must be read together." *Livingston, 184 Va. at 837, 36 S.E.2d at 565.*

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[5] There were no other entries on the NCIC form for Powell's attempted capital murder. Also, the inaccurate entry listed "felonious assault" as the original charge, the same original charge listed on the Virginia State Police disposition form associated with Powell's attempted capital murder of Kristie. (JA 568). And, in addition to the same arrest and charging dates associated with the attempted capital murder, it also listed the same sentencing hearing date and code section for assault found on the charging papers associated with the attempted capital murder. (JA 563-69).

> Thus, we hold that where, prior to the attachment of jeopardy, the Commonwealth limits the prosecution of a capital murder, undifferentiated in the indictment by the identity of the victim of the gradation offense, by naming a specific victim of the gradation offense in a bill of particulars, jeopardy will attach only to the capital murder charge as made specific by the bill of particulars.

Powell v. Commonwealth, 590 S.E.2d 537, 554 (Va. 2004). It also held that the prosecutor's comments in the first trial about Powell wanting to have sex with Stacie could not support a theory that the jury actually acquitted him of the attempted rape of Stacie because, as a matter of state law, the jury was not making any determination of a charge of attempted rape of Stacie. *Id.* at 550-52.

It clarified that, in the first appeal, it never had held that the evidence was insufficient to find that Powell had attempted to rape Stacie. Rather, its comments in its conclusion, *Powell*, 552 S.E.2d at 363 ("that there is simply no evidence upon which the jury could have relied to find that Powell committed or attempted to commit any sexual assault against Stacey [sic] before or during her murder, or that the rape of Kristie did not occur after the murder of her sister") were "made to clarify that the amended indictment must have been intended to charge Powell with the capital murder of Stacey [sic] premised upon the gradation offense of the rape of Kristie, but was

insufficient to do so because of a drafting error." 590 S.E.2d at 552.

Powell's subsequent petition for a writ of certiorari in this Court was based solely on his double jeopardy claim. This Court denied his petition on October 4, 2004. *Powell v. Virginia*, 543 U.S. 892 (2004).

III. The State Habeas Corpus Case

In his state habeas petition filed in the Virginia Supreme Court, Powell argued that he had been tried twice for the same offense, the Commonwealth was collaterally estopped from prosecuting him again for capital murder, and his trial counsel were ineffective because they did not object to the NCIC form at sentencing which he alleged contained numerous errors, including two capital murder entries. The Virginia Supreme Court unanimously rejected Powell's habeas claims in its unpublished November 8, 2005, decision. (JA 517).

The court subsequently granted Powell's petition for rehearing on his argument that his trial counsel were ineffective for failing to object to a third capital murder entry on the NCIC form, specifically the inaccurate capital murder entry described above. After full briefing and oral argument on the issue, the Virginia Supreme Court dismissed the claim in a published opinion finding no prejudice under

Strickland v. Washington, 466 U.S. 668 (1984). *Powell v. Warden*, 634 S.E.2d 289 (Va. 2006).[6] The court denied Powell's subsequent, second petition for rehearing on January 5, 2007. (JA 634).[7] As required by Virginia Code § 53.1-232.1, on January 17, 2007, the Prince William County Circuit Court set Powell's execution date for February 15, 2007.

IV. The Federal Habeas Corpus Case

On January 25, 2007, the United States District Court stayed the execution. On July 6, 2007, Powell filed a habeas petition under 28 U.S.C. § 2254 in the district court alleging his double jeopardy and ineffective assistance claims. On January 11, 2008, the district court dismissed the claims, finding that the state court's adjudication was not unreasonable under § 2254(d). *Powell v. Kelly*, 531 F. Supp.2d 695 (E.D. Va. 2008).

On April 15, 2009, after full briefing and argument, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal in a lengthy opinion. *Powell v. Kelly*, 562 F.3d 656 (4th Cir. 2009). The Fourth Circuit denied Powell's petition for

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[6] A majority of the court found that the dissenting opinion failed to take into consideration the totality of the evidence to be weighed in determining the issue of prejudice, as required by this Court in *Strickland*. *Powell*, 634 S.E.2d at 297, n.*.

[7] On June 11, 2007, this Court denied Powell's second petition for a writ of certiorari. *Powell v. Kelly*, 551 U.S. 1118 (2007).

rehearing on May 12, 2009, with no judge requesting a poll on Powell's request for rehearing *en banc*.

On May 19, 2009, pursuant to Virginia Code § 53.1-232.1, the Circuit Court of Prince William County scheduled Powell's execution for July 14, 2009. On July 2, 2009, the Fourth Circuit denied Powell's motion for a stay of execution. This Court docketed Powell's petition for a writ of certiorari on July 6, 2009.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY SHOULD BE DENIED

I. Powell never has presented his first argument to any court and, in any event, it fails to merit further review.

Powell argues that he was put into jeopardy *of his death sentence* in his first trial and that he was *acquitted of death* in that proceeding. He relies upon this Court's line of cases starting with *Bullington v. Missouri*, 451 U.S. 430 (1981), dealing with the issue of "whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence – *i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108 (2003). However, Powell never presented this argument in the court below as grounds for reversal and the

Fourth Circuit, whose judgment is before this Court for review, never addressed it. Where a petitioner's claim was "neither pressed nor passed upon" in the lower court, this Court consistently has held that it will not consider it. *See Clark v. Arizona,* 548 U.S. 735, 765 (2006), *citing Kentucky v. Stincer,* 482 U.S. 730, 747, n.22 (1987), *and Illinois v. Gates,* 462 U.S. 213, 217-24 (1983). Powell thus fails to demonstrate the necessary compelling reason for review. *See* U.S. Sup. Ct. Rule 10.

In any event, the issue is simply not presented in Powell's case. Powell never was "acquitted of death." His claim deals instead with the issue of double jeopardy in the traditional sense: was he tried twice for the same crime? It involves no prior finding of entitlement to a *life sentence*, or any other sentencing issue. Indeed, the first jury sentenced him to *death* and found the necessary sentencing-phase, statutory aggravating circumstance to support the death sentence. *Powell*, 552 S.E.2d at 354. The validity of Powell's death sentence, or the sufficiency of the evidence supporting the jury's finding of an aggravating factor, never has been at issue in his case.

What Powell seems to try to argue, for the first time, is that Virginia's capital murder elements set out in Virginia Code § 18.2-31(1-15) (premeditation plus another statutorily-defined circumstance, or gradation offense, like rape), are like sentencing-phase aggravators in other States' capital murder statutes, and therefore *actually are* sentencing factors. Therefore, his argument goes, if he has been

put in jeopardy for any of those elements once, he may not be put in jeopardy of them again under *Bullington*. The problems with this theory are many.

First, there is no authority cited by Powell, and certainly none from this Court, to support his theory. Second, *Bullington* only applies where there has been a life sentence imposed for murder; Powell never has been sentenced to life.

Third, the elements of a crime, and the sentencing-phase aggravators necessary to a death sentence, are distinct matters proving different things. Whether the defendant committed a crime, and whether he is deserving of a particular sentence, are separate inquiries determined at separate phases or "trials." Virginia's capital murder elements are not sentencing phase elements or factors. They are elements required by statute to prove guilt of the crime, not the sentence.

Fourth, Powell's citation to *Ring v. Arizona*, 536 U.S. 584 (2002), for the proposition that what you call an aggravator is irrelevant, misunderstands what was at issue in *Ring*. *Ring* did not address the Fifth Amendment prohibition against double jeopardy at trial or sentencing. *Ring* was a Sixth Amendment case addressing only the right to a jury determination of sentencing phase facts which are necessary to consideration of a death sentence, and Virginia has required jury-sentencing since Colonial times.

Fifth, Powell was acquitted in his first trial of capital murder in the commission of robbery when the jury failed to return that verdict. He never again may be tried for that crime. He was acquitted in his first appeal when the Virginia Supreme Court found, as a matter of law, that capital murder cannot be committed during the commission of a rape committed after the murder. He never again may be tried for capital murder during the commission of his rape of Kristie.

But Powell never was acquitted, at trial or on appeal, of a death sentence. No jury or court ever has found that the Commonwealth failed to prove the sentencing-phase, aggravating factors necessary to obtain a death sentence, or even that those factors otherwise were found in error. Powell is simply wrong in his assertion that the Virginia Supreme Court's discussion of the *capital murder* elements somehow was a discussion of "death-qualifying elements."

Powell's attempt to put a square peg into a round hole with his confusing *Bullington* argument is simply inapposite to his case. It certainly does not merit review by this Court.

II. Powell's bill of particulars argument addresses no federal issue.

In his second argument, Powell takes issue, as he did below, with the Virginia Supreme Court's application of its settled law that a bill of particulars, and particularly one like Powell's which expressly

was sought by the defendant for his benefit, must be read together with the indictment to determine for what offenses the defendant has been tried. *See Powell*, 590 S.E.2d at 554, *citing Livingston v. Commonwealth*, 36 S.E.2d 561, 565 (Va. 1946). Powell's argument is over how Virginia defines her offenses, not over any federal law. It thus fails to present this Court with any federal issue to decide.

Indeed, Powell's whole argument is dependent upon having this Court ignore the bill of particulars which, the Virginia Supreme Court determined, identified in this particular case, along with the indictment, the offense for which Powell was first tried and acquitted: (1) premeditated murder; (2) committed during or after; (3) his rape of Kristie. He does not quibble with the fact that the Virginia legislature intended in its capital murder statute to define separate offenses for (1) each gradation of capital murder, and (2) for each separate victim of each gradation offense. *See Powell*, 590 S.E.2d at 553-54, *citing Payne*, 509 S.E.2d at 301. He does not quibble with the fact that, in his second trial, the Commonwealth tried him for (1) premeditated murder (2) committed during or after (3) his attempted rape of Stacie. In fact, the indictment contained that very language. His entire argument is that anything outside the indictment should not have been considered. But that is an argument with the Virginia Supreme Court which he lost; it is not an argument about federal constitutional law.

Powell never has cited a single case holding that a State may not define its offenses by looking at the indictment and bill of particulars together. Certainly, with Powell expressly having asked the Commonwealth in his first trial to limit herself to one particular offense, no constitutional provisions prohibited the Commonwealth from holding Powell to his original request that he be tried only for that offense. His decision to limit the Commonwealth in his first trial to a crime he knew he had not committed, and, at the same time, to keep only to himself the knowledge that he had committed the different offense of murder during the commission of his attempt to rape Stacie, was no fault of the Commonwealth. The Commonwealth was ready, willing, and able to try him for any and all crimes for which there was evidence to prosecute.

Powell's argument always has been dependent upon re-writing Virginia law to do away with its provision for identifying offenses by considering both the bill of particulars and indictment together. Only then could he construct his argument that the elements of his crimes were the same under *Blockburger v. United States*, 284 U.S. 299 (1932). But *Blockburger* did not dictate how crimes are defined; it involved this Court defining an offense under a federal statute. Indeed, Blockburger argued that his crimes were the same because they involved sales to the same person, *id.* at 301, not unlike Powell's argument. It was the prerogative of this Court to determine that Congress meant the offenses

to be different because they involved separate sales at separate times. *Id.* Likewise, it was the prerogative of the Virginia Supreme Court to determine that the Virginia General Assembly meant for there to be different offenses when the murderer raped or attempted to rape two different gradation victims. It simply involves no federal issue.

Powell argues that the "facts" do not matter, and only the "elements" matter under *United States v. Dixon*, 509 U.S. 688 (1993). However, what Powell fails to understand is that *Dixon*, another federal statute case, was not addressing how a State defines an offense, or even how the federal court makes that determination. *Dixon* addressed the "same conduct" test the Court had created just three terms prior and now was overruling. *Id.* at 704. It simply reaffirmed the *Blockburger* test as the standard for assessing double jeopardy claims involving an offense which violates two or more statutes. *See Dixon*, 509 U.S. at 695 (criminal contempt based on a violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense because the elements of one are the elements of the other and thus the defendant already has been tried for the offense in the contempt proceeding). But Powell's *offenses* were different because they were committed against two different persons: he attempted to rape Stacie and he raped Kristie.

In Powell's case, both the district court and Fourth Circuit believed that *Sanabria v. United States*, 437 U.S. 54 (1978), governed the issue and

that the state court, while not citing *Sanabria*, followed that precedent reasonably by determining legislative intent. *Powell*, 531 F. Supp.2d at 707-09; *Powell*, 562 F.3d at 665-66. Certainly, the state court in Powell's case used the same analysis that *Sanabria* used. In *Sanabria*, the Court held, with regard to a federal statute, that "[f]ew, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977)." 437 U.S. at 69. It further held that "[w]hether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice." *Id.* at 70. Clearly, the Virginia Supreme Court determined that its legislature intended that separate capital offenses are committed when the murderer commits the gradation offenses against separate victims. *Powell*, 590 S.E.2d at 554. Because that holding was not an unreasonable application of this Court's precedent, the Fourth Circuit cannot have erred in affirming the district court's same assessment. Its straightforward analysis on a settled area of the law presents nothing compelling to review.

Powell goes astray when he speaks of the Virginia statutory framework as "multiple theories" of capital murder. It is not. Instead, its capital murder statute defines fifteen distinct offenses and, under state supreme court interpretation, each gradation offense committed against a separate victim is a separate capital murder offense.

Powell's argument that there is a conflict of opinion on this in the state courts is a make-weight argument. He cites a Maine and Louisiana case for the proposition that any charged offense which was within the scope of a previous charge is barred. But no one argues with that general principle. Powell's charge of murder/attempted rape of Stacie simply was not within the scope of the prior charge of his murder/rape of Kristie. They were two different offenses as determined unanimously by the Virginia Supreme Court and citizens of the Commonwealth through its elected General Assembly. There is no legal issue in conflict and nothing compelling about Powell's double jeopardy claim.

III. The certiorari questions at issue in *Wood v. Allen* are not at issue here.

Powell argues that this Court should grant certiorari, or hold his case, until this Court decides *Wood v. Allen*, 129 S.Ct. 2389 (2009) (granting certiorari on questions 1 and 2). However, the questions upon which this Court granted certiorari simply are not at issue in Powell's case. Question 1 asks whether a state court's decision was based on an unreasonable determination of facts under 28 U.S.C. § 2254(d)(2) when it concluded that the failure of a novice attorney, during the sentencing phase, to investigate or present evidence of the defendant's severely impaired mental functioning was a strategic decision even though the record shows otherwise.

(Pet. Cert. No. 08-9156). Obviously, Powell's case presents no such issue. Powell has presented this Court with no issue under *Wiggins v. Smith*, 539 U.S. 510 (2003), about investigation of mitigating evidence. There is no issue in Powell's case about state-court fact-finding, much less about fact-finding that is contradicted by the record.

Wood's Question 2 asks whether the federal court erred in according the presumption of correctness under 28 U.S.C. § 2254(e)(1) to facts which are supported by the state court record, instead of looking at the entire state court record to determine whether those facts reasonably were found under § 2254(d)(2). (Pet. Cert. No. 08-9156). Wood argues the federal court must determine the reasonableness of the fact-finding under § 2254(d)(2) based on the entire state court record before reaching any presumptions of correctness under § 2254(e)(1). (*Id.*). None of these concerns are at play in Powell's case.

Powell says that the Fourth Circuit applied § 2254(e)(1) in his case with respect to his ineffective assistance and double jeopardy claims. Powell misstates the record. Neither of Powell's claims involved contested facts.

His double jeopardy claim involved no contested facts or fact-finding: his indictments, bill of particulars, the record of his two trials, and the Virginia Supreme Court's first opinion on direct appeal, contained the facts which no one contested. The Fourth Circuit's opinion affirming the district

court's dismissal of the claim was a straightforward application of § 2254(d), not § 2254(e). The Fourth Circuit first stated, in general terms, the standard for any federal habeas court reviewing a § 2254 petition. *Powell*, 562 F.3d at 664. It simply quoted the statutory language of § 2254(d), and then recited the unchallenged holdings of this Court in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Schriro v. Landrigan*, 550 U.S. 465 (2007), interpreting § 2254(d). 562 F.3d at 664.

At the conclusion of this recitation, the court set forth briefly the statutory language of § 2254(e)(1): "Finally, § 2254(e)(1) provides that a state court's factual decisions 'shall be presumed to be correct' and that the petitioner bears the burden of 'rebutting the presumption of correctness by clear and convincing evidence.' 28 U.S.C. § 2254(e)(1)." *Id.* The Fourth Circuit did not, as alleged by Powell, make any determination about how and when § 2254(e)(1) would apply in a case involving state-court fact-finding.

The Fourth Circuit then discussed Powell's claims. With respect to his double jeopardy claim, it recited what Powell's arguments were, and then set forth what the law is governing the issue of double jeopardy. 562 F.3d at 665. It then recited what the Supreme Court of Virginia had held with respect to Powell's claim that his two offenses were the same, reciting from the state court's published opinion: that the General Assembly intended that the capital murder statute define separate offenses; and that Powell's second trial was for a separate offense. *Id.*

The Fourth Circuit then stated its own holding. It held that the state court decision was not contrary to clearly established law from this Court or an unreasonable application of that law. *Id.* at 665-66. It did not discuss, or apply, the § 2254(e)(1) presumption of correctness.

The Fourth Circuit then addressed Powell's claim that, even if the offenses were different, he had been tried twice because the Commonwealth had presented evidence in his first trial that he wanted to have sex with Stacie. The Fourth Circuit again recited what the state court had held: the bill of particulars restricted liability in the first trial for any charge of attempting to rape Stacie and thus he was not tried twice for the same crime. 562 F.3d at 666. The Fourth Circuit explained the role of a bill of particulars in Virginia law, and also that, as a matter of federal law, jeopardy did not attach in Powell's first trial until after both the indictment and bill of particulars had been filed. *Id.* at 666 n. 5. It held that the state court's decision was not an unreasonable determination of the facts under § 2254(d)(2) because (1) the state court held as a matter of state law that Powell was not tried for attempted rape of Stacie in his first trial, and (2) evidence that he wanted to have sex with Stacie does not demonstrate attempted rape. *Id.* at 666. The Fourth Circuit did not discuss, or apply, the § 2254(e)(1) presumption of correctness.

With respect to Powell's ineffective assistance claim, the Fourth Circuit first recited the entries on

the NCIC form, including the uncontested error. 562 F.3d at 667-68. It then recited the governing standard in *Strickland v. Washington*, 446 U.S. 668 (1984). *Id.* at 668. It recited the holding of the Virginia Supreme Court on the claim from its published opinion: Powell failed to demonstrate the requisite prejudice. *Id.* In fact, the Virginia Supreme Court's opinion on the matter was not based on any fact-finding. It accepted the uncontested fact that there was an inaccurate entry on the form for capital murder. *Powell*, 634 S.E.2d at 296. It based its finding of a lack of prejudice on the likewise uncontested and horrendous facts of the crime and Powell's conduct which were before the jury and which demonstrated beyond dispute that, if the NCIC form had not been admitted, it would have made no difference in the jury's verdict. *Id.* at 296-99.

Powell's complaint below and now that the Virginia Supreme Court failed to address the "erroneous" other two capital murder entries always has been groundless. The Virginia Supreme Court addressed Powell's complaints about the NCIC form in two opinions. The first was unpublished and addressed approximately seven allegations of error associated with the NCIC form. (JA 527-29). The second opinion, published, addressed the additional argument Powell made on rehearing regarding the inaccurate entry for felonious assault/capital murder. Powell never identified three erroneous capital murder entries. As discussed above, one entry was for his prior conviction which had been reversed on

appeal. It was not inaccurate. Another entry was for the capital murder charge which was listed as pending. That also was not inaccurate: it referred to the second trial which was being tried at the time. Only the third entry was inaccurate because it should have read "attempted capital murder" instead of "capital murder."

In the course of the Virginia Supreme Court's published opinion regarding the rehearing, the court noted that the inaccurate entry actually contained an arrest date, an offense date, and the location of the crime. From that information, all of which it is uncontested had been presented to the jury in evidence about the crimes, the court made the reasonable observation "that the erroneous entry on the NCIC form referred to Powell's attempted capital murder conviction concerning Kristie." *Powell*, 634 S.E.2d at 297. From that observation, Powell constructed in the federal courts an argument that the state court unreasonably found facts in the case.

But the Virginia Supreme Court did not base its determination of no prejudice on its observation that the NCIC entry contained information known by the jury to pertain to the ongoing capital trial; rather, it based its finding on the uncontested fact that little to no use was made of the form at trial, the uncontested fact that the inaccurate entry never was pointed out by anyone, the uncontested fact that the prosecutor accurately listed Powell's crimes orally to the jury, the uncontested facts of Powell's crimes proving his dangerousness, the uncontested facts of Powell's own

predictions that he would continue to kill, and the legal conclusion that, under Virginia law and the jury instructions, the NCIC form could not have affected the jury's finding of vileness to support the sentence. *Powell*, 634 S.E.2d at 297-99.

Powell now says that, because the Fourth Circuit in one short paragraph answered his argument – that the Virginia Supreme Court's observation about the dates and other information on the inaccurate entry was speculation – by noting that, under § 2254(e)(1), the facts are presumed correct unless Powell rebutted them with clear and convincing evidence, his case must be stayed for a decision in *Wood*. He is incorrect. *Wood* involves allegations that the federal court conflated §§ 2254(d) and (e). The Fourth Circuit's decision is bereft of any such conflation. It applies § 2254(d) to find the state court's decision reasonable, and handled Powell's complaint about the one state court factual observation – which was not the basis for the state court's finding of no prejudice – with a proper application of § 2254(e)(1) to that factual observation. It simply cannot be said that the Fourth Circuit's decision suffers from any of the conflation, or fact-finding issues, attendant to the Court's grant of certiorari in *Wood*.

Powell fails to demonstrate any compelling reason to grant review of his claims which were disposed of below by application of settled law, not contested facts. He thus fails to demonstrate under

Barefoot v. Estelle, 463 U.S. 880 (1983), any grounds to stay the scheduled execution of his sentence.

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

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